Supreme Court of the United States

OCTOBER TERM, 1942.

No.

In the Matter
of
SURF ADVERTISING CORPORATION,
Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,
Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,
Respondents.

BRIEF IN SUPPORT OF PETITION.

POINT I.

The order of affirmance should be reviewed, because it is based solely on New York law, irrespective of the Bankruptcy Law pertaining to the same subject matter.

Prudence Realization Corporation v. *Geist* (decided April 27, 1942, 62 S. Ct. 978, Advance Sheets of May 15, 1942);

Jennings, Receiver, v. *U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 55 S. Ct. 394, 79 L. Ed. 869;

Yonkers v. *Downey, Receiver*, 309 U. S. 590, 597, 60 S. Ct. 796, 84 L. Ed. 964.

This Court has occasion to consider a petition for a writ of certiorari to the Second Circuit Court, in the case of *In the Matter of Prudence Co. Inc., debtor.* The basis for the application at the time was that the Second Circuit had rendered a decision in a bankruptcy matter under the mistaken impression that this Court's decision in *Erie Railroad* v. *Tompkins*, 340 U. S. 64, required a Federal Court to apply State law to the facts in that case. The basis of the petition, therefore, was that *Erie* v. *Tompkins, supra,* was not controlling where the question in dispute involved the determination of a Federal law, particularly the National Bankruptcy Law.

This Court granted the writ (315 U. S. — , 62 S. Ct. 439, 86 L. Ed. — . On the argument of the appeal, the order of the Circuit Court was reversed, on the very ground urged in that case, and which is now being urged here. We quote from this Court's opinion on the subject:

> "Nothing decided in *Erie Railroad Co.* v. *Tompkins, supra,* requires a court of bankruptcy to apply such a local rule governing the liquidation of insolvent estates. The bankruptcy act prescribes its own criteria for distribution to creditors. In the interpretation and application of federal statutes, federal, not local law applies (citing cases). The Court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 455, 457, 60 S. Ct. 1044, 1053, 1054, 84 L. Ed. 1293, and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to

which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class. *Cf. Taylor* v. *Standard Gas & Electric Co., supra; Pepper* v. *Litton, supra.*"

The question presented below in this case involved the application of Section 60a of the Bankruptcy Act, coupled with Section 70c and Section 1, subd. 30, of the same Act, as applied to the facts. The Court below, in affirming after reargument, ruled that the New York law applied, relying, principally, upon *Kniffin* v. *State*, 283 N. Y. 317 (Reargument Op., R. 371). It held that "it has long been the New York law that such an assignment is good against a bona fide purchaser even tho the bona fide purchaser is the first to give notice to the obligor. *Fortunato* v. *Patten*, 147 N. Y. 277, 283; *Hooker* v. *Eagle Bank of Rochester*, 30 N. Y. 83. The same thing is true of an execution creditor, or a trustee in bankruptcy. *Harris* v. *Taylor*, 35 App. Div. 462; see for an interpretation of it *Sullivan* v. *Rosson*, 223 N. Y. at page 226; *Conley* v. *Fine*, 181 App. Div. 675, 679; *In re New York, N. H. & H. R. Co.*, 26 F. Supp. 874, 877 (D. Conn.); *Williams* v. *Ingersoll*, 89 N. Y. 508" (Reargt. Op., R. 372).

Relying, as the Court did, upon the New York law, the Court further went on to say *that* "*We cannot agree with appellant's contention that Section 60a of the present Bankruptcy Act affects our decision* and that there would be any unlawful preference as to any sums paid or payable after knowledge of insolvency" (Reargt. Op., R. 372).

We respectfully submit that, on the authority of this Court's ruling in *Prudence* v. *Geist, supra*, and other cases, that the learned Court below was in error in holding as it did. Section 60a should have been considered by the Court, regardless of the New York law. Section

60a, and the other applicable sections of the Bankruptcy Act, does affect the decision in this case, because the Federal law, being national in scope and requiring uniformity of application supervenes local state law when it comes to matters of bankruptcy administration.

The Manner In Which Section 60a Affects the Issues.

We have set forth the applicable provisions of Section 60a, and other pertinent sections of the Bankruptcy Law, in the Appendix. The particular portion of Section 60a defines the point of time when a transfer is "deemed to have been made".

> "For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under Chapter X, XI, XII or XIII of this Act, *it shall be deemed to have been made immediately before bankruptcy.*" (Italics ours.)

The emphasis of the law is on the word "perfected". It relates to the change of possession of the property in question. That change of possession must be determined within the definition of what constitutes a "transfer" under the law as amended in 1938. We quote the new definition of a "transfer":

> " 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing or of parting with, property, or with an interest

> therein, or with the possession thereof, or of fixing a lien upon property, or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings as a conveyance, sale, assignment, payment, pledge, mortgage, lien, incumbrance, gift, security or otherwise." (Section 1, subd. 30.)

The Court below, in affirming the District Court, held that the transfer by the debtor of the account receivable to be created, was made long before December 7th, 1939, the date of bankruptcy. It came to that decision because of the New York law relating to priority of assignment. But under the present bankruptcy statute, what the Court should have considered was as to when the transfer was *perfected.*

Obviously, the transfer of this fund was not "perfected" either to Abrams, or to Lehman, because it was still in Court, in the Clerk's hands at the time of the inception of the proceedings. Indeed, on December 7th, 1939, when the proceedings in bankruptcy were inaugurated, the money was still in the possession of Calvert Distillers Corporation, who refused to pay anybody because there were so many claimants to the money.

Under such circumstances, the new Act defines the point of time when the transfer is deemed "perfected". We quote:

> *"It shall be deemed to have been made immediately before bankruptcy."*

We respectfully submit that the lower Court should have considered this new provision of the Bankruptcy Act as defining the point of time when the transfer was *deemed to have been perfected,* so as to give possession to Abrams and to Lehman. It should not, as it has done,

disregard Section 60a of the Bankruptcy Act in its consideration of the facts and the law in the case.

That this is important appears quite clearly from the further finding of the Court that Surf was insolvent on December 7, 1939, and that Abrams certainly knew it was insolvent as early as October, 1939, when a meeting of creditors was called to consider what was to be done in view of Schub's death on October 3d, 1939. If the transfer is deemed "perfected" immediately before the filing of the petition, then surely Lehman also knew about the insolvency. That being so, the transfer, "deemed to have been made immediately before the filing of the petition" constitutes a voidable preference under Sections 60a and b of the Bankruptcy Act, regardless of the New York law. As a matter of fact, an examination of the case of *Kniffin* v. *State, supra,* cited to support the decision, indicates that the particular point involved here was not in issue in that case. What was involved in that case was the right of set-off between the State of New York and the trustee in bankruptcy. The state claimed a right of set-off because it had paid an obligation of the bankrupt to the Raymond Company, to which the bankrupt had assigned its claim as a payment for a past indebtedness. The Court of Appeals itself said:

> "In this aspect, the bankruptcy of Earle is unimportant."

We have examined the briefs in the case. Neither side touched the questions that are in issue here. Both argued only the question of the right of set-off, and not the question of the right of a person claiming an equitable lien against the funds of which he did not take possession before bankruptcy, but which then came into the constructive possession of the trustee.

That the question of bankruptcy of the debtor intervening before possession taken is of extreme importance in a consideration of a case of this kind, is clear from the decision of the Second Circuit itself, in the *Matter of Modell,* 71 Fed. (2d) 148 (2d Circt.). In that case, the Court distinguishes *Williams* v. *Ingersoll,* 89 N. Y. 508, one of the cases on New York law cited in the present opinion (Reargt. Op., R. 372). We quote from the decision:

> "The case of *Williams* v. *Ingersoll,* 89 N. Y. 508, holds that an agreement between an attorney and client that the former should have a lien upon all moneys recoverable by the latter in a pending action for malicious prosecution may be effectual as an equitable assignment or lien as against the client and his attaching creditor. *It had nothing to do with bankruptcy of the assignor or the doctrine of relating the lien back to avoid the preference provisions of the statute.*"

This opinion was rendered before the amendment of 1938. That Court likewise expressed the opinion that it is important to consider *the time when possession is taken* with respect to the rights of a trustee as against an assignee:

> "But in New York the rule is otherwise; here *the assignee must take possession before the rights of the assignor's trustee in bankruptcy arise. Zartman* v. *First Nat. Bank* (N. Y. Ct. of App.), 19 Am. B. R. 27, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083; *Mathews* v. *Hardt* (N. Y. App. Div.), 9 A. B. R. 373, 79 App. Div. 570, 80 N. Y. Supp. 462; *Irving Trust Co.* v. *Commercial Factors Corp.* (C. C. A., 2d Cir.), 68 F. (2d) 864. We regard these authorities are controlling."

That the determination of the issues presented by the controversy depends on the enforcement of a Federal law, which cannot be disregarded, and not merely on the interpretation of the New York law, must be clear from an examination not only of the Statute of 1938, but of the Congressional discussions that led up to the amendment.

First and foremost in the minds of the framers of the amendments, was the principle of equality of distribution underlying every insolvency law.

> "Equality of distribution is the key-note of every law dealing with the distribution of estates of insolvent debtors. Thus fraudulent and preferential transfers constitute an important section in the administration of bankruptcy and insolvency laws."
>
> *74th Congress, 2d Sess.* (1936), p. 187, H. R. 12889.

That principle was enunciated only recently by this Court in *Sampsell* v. *Imperial Paper Co.*, 61 S. Ct. 904, at 907.

With that in mind, we present comment in Collier's most recent edition of his Book on Bankruptcy (14th Ed. edited by James W. Moore, Associate Professor of Law, Yale University) with respect to the results sought by Congress in passing the drastic amendments to the Bankruptcy Act, to which we refer in this argument:

> "Moreover, it must be borne in mind at all times that thruout a period of thirty-five years, beginning in 1903, it was fairly evident that Congress intended to strike down secret transfers by establishing a test as to perfection of transfer that would fix the date of notoriety or the transfer as the time when its preferential character should be determined. It

was only the expression of this intent that proved faulty."

(Discussion of Section 60, heading: "*Analysis of Last Sentence of Section 60a,*" p. 892.)

That this was the purpose, is clearly shown in the "Analysis of H. R. 12889" (74th Cong., 2d Sess., 1936, p. 188):

"The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. We provide that the transfer shall be deemed to have been made when it has become so far perfected that neither a bona fide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. As thus drafted, it includes a failure to record and any other ground which could be asserted by a bona fide purchaser or a creditor of the transferor, as against the transferee. *We have also added a provision which makes the test effective even though the transfer may never have actually become perfected.*"

That the purpose of this amendment, in its effort to strike down "secret liens" included equitable liens and assignments, is clear from further comment found in Collier on Bankruptcy at page 894:

"The last sentence of Sec. 60a, of the Act of 1938, properly construed, overrules much prior case law, particularly in reference to the effect of lack of recording, *and the doctrine of relation back as applied to possession taken under 'equitable liens and assignments'.*"

A most notable expression of opinion on the intent of Congress in bringing about the amendment under discussion, is that of Professor McLaughlin, who had a great

deal to do with the change in the law. He said, with particular reference to Section 60a, and the intent to strike down secret liens:

> "Furthermore, the phrasing is not limited to secret liens within the recording acts. It is broad enough to cover analogous cases such as those where a judge made 'equitable lien' is invoked to some secret transfers invalid for failure to take the steps essential to a valid transfer at common-law."
>
> "Aspects of the Chandler Bill to amend the Bankruptcy Act."
>
> *University of Chicago Law Review*, p. 369.

We could refer the Court to other portions of the discussion which led to the drastic amendments of Section 60a and the change in the definition of what constitutes a "transfer" under Section 1, subd. 30 of the Bankruptcy Law. It may be sufficient, however, to sum up all of these discussions in the observation made by Professor Moore in Collier's 14th Edition of the Bankruptcy Act. We quote:

> "All of these amendments represented, at least in part, an effort to strike down what might be termed 'secret transfers', that is, transfers executed but not disclosed by recording, or a change of possession, so that creditors were not apprised, until perhaps immediately before bankruptcy, of the transfer or incumbrance relating to the property involved. Such transfers, usually taking the form of a mortgage, lien, pledge or other incumbrance or security device, were often not given notoriety by recording or the like until within four months or less, of the debtor's bankruptcy, when the creditor holding such an incumbrance deemed it advisable to perfect it as far as possible rather than to preserve further secrecy."
>
> *Collier, 14th Ed.*, pp. 868, 869.

This being the state of the law, and the intention of Congress in enacting the amendments to Section 60a relating to preferences; Section 1, subdivision 30 relating to the definition of a "transfer"; and Section 70c relating to the rights of a trustee as a lien creditor as against property of which possession has not been taken prior to bankruptcy, we respectfully submit that the learned Circuit Court was in error in disregarding Section 60a of the Bankruptcy Act in rendering the decision complained of. Considering the New York Law alone was not sufficient. Its duty was to consider the Bankruptcy Act regardless of the New York Law. This Court said so in *Prudence* v. *Geist, supra*, and in other cases.

We therefore respectfully submit that under the circumstances, this is a case in which the petition for a writ is appropriate, and should be granted, so that this Court may review the decision of the Second Circuit, which we believe was erroneous, in view of the amended bankruptcy Law applicable to the facts.

POINT II.

The decision sought to be reviewed is in conflict with decisions of other Circuit Courts bearing on the same subject matter of "equitable liens".

If we were to assume that no change whatsoever was brought about in the structure of the Bankruptcy Act by the amendment of 1938, affecting the point at issue, nevertheless, we must come to the conclusion that the learned Circuit Court rendered a decision in this case in conflict with decisions of other Circuit Courts on the same subject matter, to wit, the time when the transfer occurred and its effect on so-called "equitable liens" when the transfer is made at a time when the debtor is in-

solvent, and known to be so by the transferee. Indeed, we might go even further and show that the Second Circuit, in rendering its present decision, apparently has run *contra* to its own decisions in similar cases rendered for years prior to this one.

Of course, cases of preferences always turn on what happened at the time when the transfer was "perfected", that is to say, when possession of the disputed fund was taken by the transferee. If, at that time the bankrupt was insolvent and the transferee knew him to be insolvent, the transfer is ineffective against a trustee, *even in a case of equitable liens.* Under the present law, the point of time of possession taken (lacking actual possession) is "immediately before the filing of the petition" (Sec. 60a). That point is significant here by reason of the fact that *actual* possession was not taken either by Abrams or Lehman before bankruptcy.

Therefore, we believe ourselves justified in stating that, in the intent of the law, possession was deemed to have been taken by Abrams and Lehman immediately before December 7th, 1939. The record is replete with proof, that at that time Surf was insolvent, and that Abrams and Lehman had reasonable cause to know it to be insolvent. The proof also shows that if this money were turned over to Abrams and Lehman, other creditors would get very little, if anything. They certainly would not get as large a percentage of their debts paid as Abrams and Lehman could get. Other Circuit Courts seem to take a different legal view in such a situation, and the present decision seems to be contrary to that of other Circuit Courts.

In the case of *Hayes* v. *Gibson*, 3rd Cir., 279 Fed. 812, the question at issue was the effect of an "equitable lien" as against the rights of a trustee. There, certain barges

and tugs were sold under maritime liens. A balance of over $27,000 resulted and was left in the hands of the trustee in bankruptcy. The fund was claimed both by Hayes and the Trustee. The Court said:

> "The appellant bases his title upon an equitable lien and a chattel mortgage. The court below found that the facts hereinbefore stated created an equitable lien on the boats in favor of the appellant more than four months before the petition in bankruptcy was filed."

The Court then discussed the amendments of 1910 and the decisions under it, and came to the conclusion that in a contest between the trustee and one making claim to an equitable lien arising from an express contract, *such an equitable lien may not be enforced against the trustee.* It said:

> "An agreement made more than four months before a petition in bankruptcy is filed, to mortgage or transfer, is in fact not a mortgage or transfer. The legal title still remains in the owner, unincumbered, at the beginning of the four months' period, and stands pledged under this section of the act for the benefit of all creditors *pro rata.*"

Hayes v. *Gibson* (3rd Cir.), 279 Fed. 812.

In the *Matter of Traub* (8th Cir.), 297 Fed. 458, the question related to an oral agreement by the bankrupt to execute a mortgage as security for a debt. The mortgage was finally executed, delivered and recorded within four months before the filing of the petition. The Court held the transfer to be a preference, even though the agreement was made more than four months before the bankruptcy and constituted an equitable lien.

In the case of *Citizens Trust Company* v. *Tilt* (3rd Cir.), 200 Fed. 410, the Court's decision related to "a transfer of security made within four months before the filing of the petition, when the bankrupt was insolvent and known to be so by the transferee". The transfer was declared voidable as a preference. This was so irrespective of the fact that the transfer "was made pursuant to a prior agreement made more than four months before the bankruptcy". This, the Court held, "was not sufficient to deprive the taking of the security within four months before the bankruptcy, of its character as a voidable preference".

Another case in the Eighth Circuit, holding to the same view and opposed to the decision of the Second Circuit now under consideration, is the case of *In re Great Western Mfg. Co.*, 152 Fed. 123.

All of these cases depend on the point of time when the transfer was "perfected". Indeed, the Second Circuit itself so held in the case of *Corney* v. *Saltzman*, 22 Fed. (2d) 268, in the following language:

> "It is when the transfer is made that the effect upon the rights of creditors takes place and becomes known, and not when the agreement to make the transfer is entered into."

The most recent case on the subject in a Circuit Court other than the Second Circuit is in the Fourth Circuit (*Lone Star Cement Corp.* v. *Swartwout, et al., Trustees*, 93 Fed. (2d) 767 (4th Cir.)). That case was decided in January, 1938, before the effective date of the Chandler Act. There the bankrupt was indebted to the cement corporation for various sums of money, and had assigned to it certain accounts receivable which the debtor expected

to be created by work done on various WPA projects. The Government would pay for this work when completed. It was these future created accounts receivable that the cement corporation received by way of assignment and which it sought to enforce.

The Court stated the problem in the following language:

> "The Cement Corporation claims that the agreement described created (1) an equitable assignment of the monies received by the Lumber Company from the United States, impressing them with an equitable lien to secure the payment of the debt, and (2) an assignment of the accounts receivable above described impressing a lien upon them and upon such proceeds thereof as may have been collected or may hereafter be collected by the bankrupt or the representatives of the bankrupt estate."

This problem appears to be exactly like our own. The Court held the equitable lien not well founded as a matter of law. It said:

> "In harmony with these requirements, it is generally held that a mere agreement to pay out of a particular fund does not constitute an assignment of the fund or any part thereof to the promisee, because it amounts only to a mere promise to pay and does not meet the test of an intention on the part of the assignor to give, and of the assignee to receive, present ownership of the fund. *Christmas* v. *Russell*, 14 Wall. 69; *State Central Sav. Bank* v. *Hemmy* (C. C. A. 8th Cir.), 29 A. B. R. (N. S.) 132, 77 F. (2d) 458; *B. Kuppenheimer & Co.* v. *Mornin*, 78 F. (2d) 261; *Pratt Lumber Co.* v. *T. H. Gill Co.*, 278 F. 783; Williston on Contracts, Sec. 428."

In our case, the Referee found it difficult to determine whether the Abrams transaction was a "sale", or for

"security" (Ref. Op., R. 301, 302). He concluded that it was not for security (Ref. Op., R. 302). However, Judge Leibell, in the District Court, held "The referee has found that the transaction between Abrams and Surf amounted to a 'sale' of the debtor's Calvert contracts * * *. Technically, there could not be a 'sale' of such a contract; *but there could be an assignment of the payments earned by Surf's labors in providing and servicing the signs*" (R. 318).

This view was accepted by our Circuit Court in its first decision, as follows:

> "We think that the assignments constituted no more than promises to pay the assignees out of funds to be created by the assignor's labor, which could not withstand the attack of the trustee in bankruptcy. It is manifest that the distribution of the moneys in question to Abrams or Lehman would result in a preference" (R., p. 335).

No formal findings have been made by the Referee or by the District Court. We must assume that the Circuit Court's opinion of the factual relationship with respect to the fund, was in accord with what Judge Leibell held, to wit, *they were mere promises to pay a debt out of future earned income growing out of the contracts.*

In its opinion reversing itself after reargument, the Circuit Court did not change that view of the transaction. It said:

> "This is because the contracts, *and not the moneys accruing under them*, were the subjects of the assignments" (Reargt. Op., R., p. 372). (Italics ours.)

If that is so, and if the moneys accruing under the contracts were *not* the subjects of the assignments, then the

inference is inevitable that all that Surf did was to promise Abrams repayment of loans (made and to be made) out of future earnings resulting from performance of the contracts. That does not constitute an equitable lien, enforceable against a trustee in bankruptcy. Since the Court below says it does, then it appears to be in conflict with the decision of other Circuit Courts on the same subject.

Referring again to the case of *Lone Star Cement Corp. v. Swartout, supra* (4th Cir.), that Court held:

> "There is a distinction between a valid equitable assignment, creating a present right in the assignee, and an equitable lien which may arise under some circumstances from a promise to pay a debt in the future out of a particular fund." (Citing cases.)

The important distinction between the two promises, is clearly brought out in this Court's opinion in the case of *Christmas* v. *Russell*, 14 Wall. 69, at 71, 20 L. Ed. 762. This Court said this:

> "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he did, it is fatal to the claim of the assignee."

It seems to us that all that Surf did with respect to the moneys borrowed from Abrams, or which he expected to borrow from Abrams, was to promise to Abrams that as soon as he received payment of rentals from Calvert he would turn the check, or the proceeds, over to Abrams in repayment of the loans. If that is all there is to the case, and we can find nothing else in it, there was no equitable lien; there was merely *a promise to transfer when the funds were collected by Surf.* Since, in this

case the fund in court must be deemed to have been transferred immediately before bankruptcy, then we respectfully submit that the decision affirming the order of the District Court, made in the Second Circuit, is in conflict, not only with well-recognized principles of law affecting the subject matter of the decision, but is also in conflict with decisions of other circuits on the same subject matter in dispute.

Under the circumstances, we respectfully submit that this is a valid reason for granting the petitioner's writ of certiorari.

POINT III.

The writ should be issued because the Second Circuit has decided a question of Federal Law, which has not been, but should be, settled by this Court.

The Court's attention is respectfully, and especially, called to the last opinion of the Circuit Court, which reversed its former decision, and the reasons given for such reversal.

> "We cannot agree", said the Court, "with appellant's contention that Section 60a of the Bankruptcy Act affects our decision, and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency" (Reargt. Op., R. 372).

It is quite apparent from this statement that there was proof of insolvency of the Debtor, and that there was also proof of knowledge of such insolvency on the part of both Abrams and Lehman, even though, under the present statute, proof of knowledge was not necessary, "reasonable cause to believe" being sufficient.

Now, our contention below was based consistently on our view of the facts in the light of the amendment to the Bankruptcy Law, commonly known as the Chandler

Act, and passed by Congress in 1938. We have already called the Court's attention, in our previous argument, to the need of a federal court, and especially one in bankruptcy, to apply federal law, rather than State law affecting the rights of parties, one of whom is in bankruptcy. We believe that the decision of the Court below which disregarded Section 60a in a consideration of the facts, should not be permitted to stand as an authority, without further careful consideration of the new law by this Court.

That it is important for this Court to consider this case in the light of the Chandler Act of 1938, is perfectly clear from what other Courts have done with regard to the same subject matter in issue.

We have found at least two cases in which this question arose directly since the amendment of 1938, and in which the Courts though of inferior jurisdiction, took the view advanced by the trustee in this case.

In the case of *Matter of Talbot Canning Corporation* (D. C. Maryland), 35 F. Supp. 680, District Judge Coleman had before him a case where a bankrupt had made an assignment to a creditor of accounts receivable to be created in the future, on a contract which he then had, or was about to get. Judge Coleman held such an assignment valid under Maryland law. But Judge Coleman did not stop there. He then considered the effect of the amendment of the Bankruptcy Act in 1938, upon such a transaction wherein there was a claim of an "equitable lien". After discussing the state of the law prior to the Chandler Act, he pointed out that a change has been made by the amendment in Section 60a and 60b of the present Bankruptcy Act. He laid emphasis on the new definition of "transfer", as well as the time when it became "perfected" under the Chandler Act, and while he did not decide the case definitely (sending it back for

further testimony), it seems perfectly clear from the opinion, that Judge Coleman felt constrained to interpret the Maryland law, not as standing by itself, but in the light of the new amendment to the Bankruptcy Act passed in 1938.

This case of Talbot Canning Company came up before the Circuit Court of Appeals in the Fourth Circuit in 1942. It is reported *sub. nom. Associated Seed Growers, Inv.* v. *Geib, Trustee, et al.*, 125 F. Supp. (2) 683. The Circuit Court, considered only the facts and the Maryland law. It found that written assignments had been made by the bankrupt to the creditor in the form of a letter addressed to the brokers, directing them to pay to the Seed Growers the sum of $14,150 on the sale of goods to be manufactured by the bankrupt in the season of 1938. It further found that the assignment was accepted by the brokers in writing, and a copy sent to the Seed Growers.

It also found that there was a present consideration for the assignment and not an antecedent debt, and it thereupon concluded that an essential element of a voidable preference as defined in Section 60a of the Bankruptcy Act, was missing. It reversed the District Court and directed entry of an order in favor of the creditor with respect to the fund.

The Circuit Court did not discuss that part of Judge Coleman's opinion relating to the effect of the new amendment upon transactions of this kind: that is to say, transactions in which an "equitable lien" to a fund is claimed. It evidently did not deem it necessary to do so in view of its findings of fact that, first, there was a present consideration, and hence no antecedent debt, and second, that notice was given of an acceptance of a direction by the bankrupt to pay to the Seed Growers out of the fund to be created.

We are therefore left in the dark insofar as any decisive opinion by a Court of higher jurisdiction is concerned, on a very important question discussed by District Judge Coleman in its opinion, as to the effect of the Chandler Act of 1938 an "equitable liens".

Another District Judge had occasion to say the same thing as Judge Coleman did. *In re Seim Construction Co.*, 37 F. Supp. 855 (D. C. Maryland, 1941). There District Judge Chesnut remarked that "the main purpose of this section of the bankruptcy law under consideration (Section 60) is to protect creditors from secret preferential liens". He further says:

> "The Chandler Act made important changes in Section 60a of the Bankruptcy Act (see 11 U. S., C. A. Section 96a and b). Cum. Pocket Part 1940)."

The Court then sets forth the nature of the changes, putting emphasis on the phrase "perfected" in quoting from the law.

He held that the assignment in that case created an equitable lien, even though it was for a part only of the funds anticipated to come into future existence on an existing contract. But he also held, as did Judge Coleman in the *Talbot Canning* case, that the question must be determined by the Maryland law.

Coming back to a discussion as to the date when the assignment became "perfected" under the present Bankruptcy Law, Judge Chesnut held that while the assignment was dated August 11th, 1939, it did not become "perfected" until after it was filed in the receivership case on December 22d, 1939, and the receiver was appointed. He said that this constitutes the notice to the obligor of the funds and he adds "and certainly no superior rights could thereafter be obtained by anyone because the fund was then paid over to the receiver for account of all whom

it may concern". Judge Chesnut disallowed the creditor's claim as a secured claim. We have not been able to find whether this case went to the Circuit Court.

In the decision of the Second Circuit now sought to be reviewed, in its second opinion the Circuit Court held that the date of the transfer is the date of the assignment, and created an equitable assignment outside the four months period. At the same time it refused to consider Section 60a of the Bankruptcy Act as amended in 1938, and its new definitions of transfer and the date of "perfection" of the transfer.

Because of these conflicting views on so important a subject as the interpretation of the new amendment to the Bankruptcy Law, we respectfully submit that the matter is of very great importance, not only to the courts, but to the commercial community. All of us ought to know, by a decision of this Court, whether the intention of Congress to strike down the barrier of secret liens, has been finally achieved by the amendment of 1938, or whether these secret liens shall continue as heretofore, to the detriment of business in general, and particularly, to those who extend credit in ignorance of secret arrangements for security.

CONCLUSION.

We therefore respectfully submit that the petitioner has shown good reason for his petition filed herein, and that this Court should grant it, and issue a writ of certiorari to the Second Circuit Court of Appeals, so as to review the order of affirmance following a previous order of reversal in this case.

Respectfully submitted,

DAVID HAAR,
Attorney for Petitioner.